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CHARLES ELMORE

No. 5

In the Supreme Court of the United States

OCTOBER TERM, 1932

THE NEW YORK CENTRAL SECURITIES CORPORATION, APPELLANT

v.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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OPINIONS BELOW

The opinion of the specially constituted District Court (R. 185) is reported in 54 F. (2d) 122. The original report of the Commission (R. 31) is reported in 150 I. C. C. 278, its supplemental report (R. 93), in 154 I. C. C. 489, and its final report (R. 148) in 158 I. C. C. 317.

JURISDICTION

The decree of the District Court was entered June 24, 1931. (R. 212.) A petition for rehearing filed on June 26, 1931, was denied. (R. 214.) The petition for appeal filed July 23, 1931, was allowed on the same day. (R. 226, 231.)

The jurisdiction of this Court rests on the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220 (U. S. C., Title 28, Sec. 47), as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U. S. C., Title 38, Sec. 345).

QUESTIONS PRESENTED

1. Whether the orders of the Commission (a) authorizing the New York Central Railroad Company to acquire control by lease of the systems of the Big Four, the Michigan Central, and the Chicago, Kalamazoo & Saginaw Railway Company; and authorizing the Big Four to acquire control by lease of properties of the Cincinnati Northern Railroad Company and the Evansville, Indianapolis & Terre Haute Railway Company; and (b) authorizing the assumption of certain obligations with respect thereto, were within the constitutional and statutory authority of the Commission.

2. Whether the findings of the Commission that such acquisitions of control were in the public interest and that the considerations, terms, and conditions of the acquisitions were just and reasonable, are adequately supported by the evidence.

One of the questions considered by the lower court, upon the motion to dismiss, was whether the appellant, as a minority stockholder of the three principal carriers involved, had sufficient standing to maintain a suit under the Urgent Deficiencies Act of October 22, 1913. (*Pittsburgh & West Virginia Railway* v. *United States,* 281 U. S. 479.) It is our view that certain of appellant's contentions may not properly be raised in a suit under that Act (*infra,* pp. 11, 31–34), but that the court below correctly decided the jurisdictional points.

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in the Appendix, *infra,* pp. 46–51.

STATEMENT

This is a suit to set aside and annul certain orders of the Interstate Commerce Commission, entered on July 2, 1929 (R. 23, 100), and December 2, 1929 (R. 121), authorizing the New York Central Railroad Company (the New York Central) and the Cleveland, Cincinnati, Chicago & St. Louis Railway Company (the Big Four) to enter into certain leases and to assume certain obligations, pursuant to applications therefor made under Section 5 (2) and Section 20a of the Interstate Commerce Act.

On July 29, 1926, the New York Central filed its application under Section 5 (2) for authority to

acquire control, by 99-year lease, of the railroad systems of the Big Four, the Michigan Central Railroad Company (the Michigan Central) and the Chicago, Kalamazoo & Saginaw Railway Company (the Kalamazoo). Contemporaneously, the Big Four filed a similar application for permission to acquire control of the properties of the Cincinnati Northern Railroad (the Cincinnati Northern), and the Evansville, Indianapolis & Terre Haute Railway Company (the Terre Haute). The two applications were consolidated and heard before the Commission in January, 1927, various interested parties, including the appellant and representatives of certain short-line railroads, being allowed to intervene. Appellant opposed both applications as a stockholder of the New York Central, the Michigan Central, and the Big Four, its holdings, including that of Clarence H. Venner, C. H. Venner & Company, and General Investment Company, consisting of 1,152 shares of New York Central, 286 shares of Michigan Central, and 200 shares of Big Four stock. (R. 10.)

On January 14, 1929, the Commission issued a comprehensive report indicating its approval of both applications but withholding final approval until the New York Central entered into negotiations with certain intervening short-line carriers with a view to acquiring their lines. (R. 31, 83.) On April 27, 1929, the New York Central filed a supplemental petition showing that it had complied with the conditions outlined by the Commis-

sion. The Commission thereupon issued its supplemental report and order of July 2, 1929, granting the requested authority. (R. 93, 100.)

On July 24, 1929, the New York Central applied for authority under Section 20a to assume, as lessee, certain obligations and liabilities with respect to the securities of the Big Four, the Michigan Central and the Kalamazoo, and the Big Four made similar application with respect to the securities of the Cincinnati Northern and the Terre Haute. The appellant again intervened. On December 2, 1929, the Commission entered an order granting the requested authority (R. 121–142), a further report being rendered. (R. 148.)

In support of the applications of the New York Central and the Big Four, under paragraph (2), Section 5, it was testified that further unification and coordination of the lines was necessary in order to bring about their handling by one strong operating unit. Certain economies and advantages were expected to be derived from such unified operation, including the revision of routes, and the development of new routes, expected to result in lowered transportation costs and the improved handling of traffic; the adoption of a unified accounting system in place of the detailed accounting theretofore required; and the indefinite postponement of large expenditures contemplated for the creation of additional repair shops, through joint use of the combined facilities.

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There was evidence that the leases were justified by the complementary relationship existing between the carriers. The New York Central was incorporated in 1914 under the laws of six States [1] by the consolidation of eleven carrier companies, including the New York Central & Hudson River Railroad Company and the Lake Shore & Michigan Southern Railroad Company. (R. 35.) Its main line extends from New York City to Chicago by way of Albany, Buffalo, Cleveland, and Toledo, and it has connecting lines in the six States of its incorporation as well as in New Jersey, Massachusetts, and West Virginia. The Big Four, organized in 1889 by a consolidation of three companies, under the laws of Ohio and Indiana, has its main line from a connection with the New York Central at Cleveland through Indianapolis to St. Louis, and important radiating lines from Indianapolis into Ohio and Illinois. The Michigan Central, a Michigan corporation, has its main line from Buffalo along the north shore of Lake Erie to Windsor, Ontario, and Detroit, Michigan, thence across the southern part of the lower peninsula of Michigan to Chicago. (R. 35.) The Kalamazoo operates between Woodbury and Pavilion Junction, Michigan, and connects with the Michigan Central and New York Central at Kalamazoo. (R. 36.) The Cincinnati Northern extends from a connec-

[1] New York, Pennsylvania, Ohio, Michigan, Indiana and Illinois.

tion with the Michigan Central at Jackson, Michigan, to a connection with the Big Four at Franklin, Ohio, whence it operates over the tracks of the Big Four to Cincinnati. The line of the Terre Haute is from a connection with the Big Four at Terre Haute to Evansville, Indiana. The total main-line mileage owned or leased by the six carriers involved in the applications totaled 10,760 miles. (R. 37.)

The Commission found that the Big Four had a peculiar value to the New York Central lines in that it traversed important industrial and agricultural territory in Ohio, Indiana, and Illinois not served by the former, and because of its stations at Ohio, Mississippi, and Illinois river crossings which would extend the lines of the New York Central to connections with the South, Southwest, and West. As to the Michigan Central and the New York Central lines, which traverse opposite shores of Lake Erie, the Commission found that they were complementary, the Michigan Central having the New York Central as its only system outlet to the East at Buffalo, and the New York Central interchanging traffic at that point with the Michigan Central destined to points west and northwest of Lake Erie. (R. 38.) The roads were closely related through stock ownership, the New York Central owning 84.7% of the preferred stock and 91.3% of the common stock of the Big Four; 99.1% of the stock of the Michigan Central; and 40% of the

stock of the Kalamazoo, the remaining 60% being owned by the Michigan Central. (R. 11.) The New York Central and its subsidiaries, the Big Four, and the Michigan Central also have common executives, 13 of the 15 directors of the last two carriers being also directors of the New York Central.

The proposed leases, which were similar except in the rentals provided, embraced the lessor's entire owned and leased properties, including income from investments, and excepting corporate franchises, books, records, special deposits, and securities issued or assumed and nominally outstanding. Cash and current assets were to be applied by the lessee to the liquidation of current and deferred liabilities, an accounting to be had upon the termination of the lease. Capital expenditures, including extensions, additions, and betterments, made by the lessee were to be reimbursed by the lessor's issuance of stock, bonds, or other securities, to be taken by the lessee at their fair value, not less than par, as agreed upon or determined by arbitration.

As rent for the leased properties the lessee covenanted to pay the lessor, or for its account, sums required to maintain the lessor's corporate existence, its taxes, and assessments, interest on securities then outstanding or thereafter issued or assumed, rentals and charges accruing under leases and contracts, and specified amounts equivalent to annual dividends upon each share of the lessor's

capital stock not owned by the lessee.[2] The rentals to be paid were (R. 46):

Company	Class of stock	
	Preferred	Common
	Per cent	*Per cent*
Big Four	5	10
Michigan Central		50
Cincinnati Northern		12
Kalamazoo		6
Terre Haute		4

It was provided in the leases that, as an alternative to accepting the prescribed rentals, the minority stockholders might have the option of selling their stock to the lessee at values to be determined by agreement or arbitration.

On August 21, 1929, appellant filed the present suit, alleging, *inter alia:* (a) That the acquisitions by lease would constitute a consolidation of the carriers "into a single system for ownership and operation" within the meaning of Section 5 (2) of the Act and were hence beyond the Commission's permissive authority; (b) that the proposed leases were oppressive to the minority stockholders of the Big Four and Michigan Central because of the rentals provided; (c) that the leases violated the

[2] In the case of the proposed Michigan Central lease the New York Central agreed to pay such dividends on the shares of Michigan Central stock pledged as collateral under a collateral trust indenture of the New York Central & Hudson River Railroad Company, dated April 13, 1898, as would enable the trustee to pay the 3½% interest due on $21,550,000 of bonds secured by the pledge of such stock.

Federal Anti-Trust laws, and that the Commission was without valid power under paragraph (8), Section 5, to suspend the application of such laws; (d) that the Michigan Central lease had not been authorized, as required, by its bond holders; and (e) that the Commission was without authority to condition its approval upon the acquisition by the New York Central of certain short lines.

On December 24, 1929, a supplemental petition was filed attacking the Commission's order under Section 20a of the Act, authorizing the assumption of obligations and liabilities by the New York Central and the Big Four. It was therein alleged (f) that the proposed leases in their rental terms violated the General Code of Ohio, were *ultra vires,* and could not be authorized by the Commission. Answers were filed by the United States, the Commission, and the carriers to the original petition (R. 24, 28, 101), to the supplemental petition (R. 158, 144, 160), and the United States and the Commission moved to dismiss (R. 162, 163). The lower court, after hearing, dismissed the petition upon the merits. (R. 212.)

SUMMARY OF ARGUMENT

I

The orders of the Commission authorizing the acquisitions of control and the assumptions of obligation were within the constitutional and statutory powers of the Commission. The acquisitions

of control by lease, although there was antecedent stock control, would not constitute a consolidation beyond the power of the Commission to authorize under Section 5 (2) of the Act. The term "consolidation" means the combination of carriers into one corporation. The Commission has consistently held the view that acquisition of control by long-term lease, preceded by control through stock ownership, is not a consolidation. The interpretation placed upon a statute by the administrative body is entitled to great weight.

The Commission had valid power to authorize the acquisitions, even if the Anti-Trust laws were violated, which is not conceded. Section 5 (8) relieves carriers acting under the Commission's permissive authority from the restraints of such laws. Section 5 (8) is not unconstitutional as an improper delegation of legislative power, nor is the statutory standard of public interest governing the exercise of the Commission's power an insufficient standard.

The appellant, as a minority stockholder of the three principal carriers, can not in this proceeding raise the question whether the leases are within the carriers' charter powers or whether the Michigan Central lease was duly authorized by its stockholders. *Pittsburgh & West Virginia Railway* v. *United States*, 281 U. S. 479. The former question could only be raised in a direct proceeding by the incorporating state and the latter only by a party in interest under the Michigan Central agreement alleged to have been breached. It is not clear,

moreover, that the proposed leases were beyond the carriers' charter powers. If that were assumed, the Commission might still authorize the acquisitions of control and assumptions of liability in view of the exclusive authority granted to it under Sections 5 and 20a with respect to such subjects. Section 20a(2) which requires as a condition to authorizing the assumptions of liabilities the finding of the Commission that the assumption is "for some lawful object within [the applicant's] corporate purposes" does not mean that it shall be within the carrier's charter powers.

The Commission as a condition to its order authorizing the acquisition of the leases required the New York Central to make provision for taking over certain intervening short-line carriers. Since the New York Central has complied with the condition, the appellant, a minority stockholder, can not complain of it in this suit. However, the Commission had power to attach the condition, Section 5(2) expressly permitting it to grant conditional approvals. The condition was reasonable in view of the evidence and the general purposes of the Transportation Act.

II

The Commission's findings that the terms of the proposed leases were just and that the acquisitions of control would serve the public interest are adequately supported by the evidence. The leases provided for payments to minority stockholders of

$5 per share on Big Four preferred stock, $10 on Big Four common stock, and $50 on Michigan Central stock; or, in the alternative, that the lessee would purchase such stocks at prices fixed by arbitration. The rentals payable on Big Four and Michigan Central common stocks were approximately double the average dividend payments for the years 1922 to 1927, and constituted, respectively, a return of 4.9% and 7.8% on the stockholders' equities per share. Although both the Big Four and Michigan Central had large surpluses, the Commission considered that fact in approving rentals as high as those provided. The payments guaranteed over a 99-year period involve risks to the operating road, with a correlative diminution in risk to the minority stockholders, which must be considered in passing on the fairness of the rental terms. The entire transaction was subjected by the Commission and the lower court to that careful scrutiny required where one of the parties has conflicting interests.

The Commission's finding that the public interest would be served by the acquisitions is justified by the evidence. There was testimony that numerous advantages, such as the direct and more economical routings of traffic, reduced transportation and accounting expenses, and the postponement of contemplated construction of additional repair shops, would result from the joint operation of the roads. The matter is essentially for the determination of the administrative body.

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ARGUMENT

I. THE ORDERS OF THE COMMISSION AUTHORIZING THE ACQUISITION OF CONTROL AND THE ASSUMPTION OF OBLIGATIONS WERE WITHIN ITS CONSTITUTIONAL AND STATUTORY POWERS

The issues raised by appellant (*supra,* p. 9) relate both to the scope of the Commission's power under Sections 5 and 20a of the Interstate Commerce Act and to the propriety of its action in authorizing the consummation of the leases described in the applications. The contentions based upon the lack of statutory authority center chiefly upon the construction to be placed upon Section 5 of the Act, although the claim that the proposed leases are beyond the charter powers of the corporations involves a consideration of the language of Section 20a of the Act. Only one constitutional question is raised, *viz,* whether Section 5(8) constitutes an improper delegation of legislative power. The questions relating to the Commission's power will be first considered.

1. The acquisitions of control authorized by the Commission do not constitute a consolidation under Section 5(2)

Appellant's first contention is that the Commission was without power under Section 5(2) to authorize the acquisitions of control by lease since a consolidation would result.

Section 5 of the Interstate Commerce Act contains provisions, added by Transportation Act, 1920 (41 Stat. 480), which are directed toward securing

a more efficient and adequate transportation service through closer coordination of the carriers in rendering the general transportation service. Paragraph (1) of that section empowers the Commission to authorize by order the pooling of freights and with that we are not here particularly concerned. Paragraphs (2) and (3) provide that:

> (2) Whenever the Commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this Act, that the acquisition, to the extent indicated by the Commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the Commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises.
>
> (3) The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1) or (2), as it may deem necessary or appropriate.

The succeeding paragraphs direct the Commission to prepare and adopt a plan for the consolida-

tion of the railroads into a limited number of systems, whereunder "competition shall be preserved as fully as possible and wherever practicable the existing routes and channels of trade and commerce shall be maintained;" to give due publicity to its tentative plan and after reasonable notice, including notice to the States and following hearings, to adopt and publish a plan; "but it may at any time thereafter, upon its own motion or upon application, reopen the subject for such changes or modifications as in its judgment will promote the public interest." Paragraph (6) states that it shall be lawful for two or more carriers "to consolidate their properties or any part thereof, *into one corporation* for the ownership, management, and operation of the properties theretofore in separate ownership, management, and operation," subject to the conditions that the consolidation must be in harmony with and in furtherance of the complete plan of consolidation adopted by the Commission and must be approved by the Commission. Applications to the Commission for such approval and hearings thereon are provided for. Paragraph (8) provides that the carriers affected by any order "made under the foregoing provisions of this section" shall be relieved from the antitrust laws "and of all other restraints or prohibitions by law, State or Federal, in so far as may be necessary to enable them to do anything authorized or *required* by any order made under and pursuant to the foregoing provisions of this section."

Appellant asserts that the leasing of the Big Four, and the Michigan Central for 99 years, when considered in the light of the New York Central's antecedent stock control, would constitute a "consolidation" within the foregoing provisions of Section 5.

There is nothing in Section 5(2) which limits the power of the Commission to approve leases to cases where control does not already exist by stock ownership. The Commission is authorized to approve acquisitions either under lease or by the purchase of stock, or in any other manner, provided consolidation under a single system for ownership and operation does not result. The only question is as to the meaning of "consolidation." That term is qualified in Section 5(2) by "a single system for ownership and operation," and in Section 5(6) by "into one corporation." The only test therefore, is whether there results ownership by one corporate entity. The leases here expressly provide that the corporate identities of the lessor roads shall be preserved, provision being made for the return of the leased roads at the termination of the leases. No new corporation in which title is vested is created by the proposed leases, title to the leased properties remaining in the lessor roads. The distinction made by Section 5 between consolidations and other acquisitions of control is that which exists under the general law. A consolidation is generally defined as a combination of cor-

porations resulting in the creation of a new corporation (in which title to the assets is vested) and usually in the dissolution of the constituent companies. *Railroad Company* v. *Georgia,* 98 U. S. 359, 363; *Minneapolis & St. Louis Railway Co.* v. *Gardner,* 177 U. S. 332; *Lee* v. *Atlantic Coast Line R. Co.,* 150 Fed. 775, 787.

If it be assumed that there is any ambiguity in Section 5 as applied to a situation where the sought control by lease is preceded by stock control, that ambiguity has been resolved in favor of the construction of the term "consolidation" so as not to apply to the present situation by the administrative interpretation placed upon the section by the Commission. In *Logan* v. *Davis,* 233 U. S. 613, 627, this Court said:

> * * * Many thousands of acres have been patented to individuals under that interpretation, and to disturb it now would be productive of serious and harmful results. The situation therefore calls for the application of the settled rule that the practical interpretation of an ambiguous or uncertain statute by the Executive Department charged with its administration is entitled to the highest respect, and, if acted upon for a number of years, will not be disturbed except for very cogent reasons. *United States* v. *Moore,* 95 U. S. 760, 763; *Hastings and Dakota Railroad Co.* v. *Whitney,* 132 U. S. 357, 366; *United States* v. *Alabama Great*

Southern Railroad Co., 142 U. S. 615, 621; *Kindred* v. *Union Pacific Railroad Co.*, 225 U. S. 582, 596.

To the same effect see *B. & M. R. R. Co.* v. *Hooker*, 233 U. S. 97, 118, and *New Haven R. Co.* v. *Int. Com. Comm.*, 200 U. S. 361, 401.

That the Commission has consistently interpreted section 5 (2) as empowering it to authorize similar acquisitions of control, and pursuant to such authority unification of many thousands of miles of railroad has been accomplished, is shown by decisions of the Commission, among which the following may be mentioned: *Control of El Paso & S. W. System*, 90 I. C. C. 732; *Control of Alabama & Vicksburg, etc.*, 111 I. C. C. 161, 169; *Lease of Pan Handle*, 72 I. C. C. 128, 133; *New York Central Leases*, 72 I. C. C. 243; *Control of Central Pacific*, 76 I. C. C. 508. In *Nickel Plate Unification*, 105 I. C. C. 425, although the proposed acquisition was held not to be in the public interest, the Commission nevertheless held it had jurisdiction. At page 430 the decision reads:

> The second question raised by interveners is that we are without authority under paragraph (2) of section 5 of the act to approve the application for unified control and operation in the manner proposed, as they contend it is in effect a consolidation of the carriers into a single system for ownership and operation. It seems only necessary to

refer to many other cases where we have held that control effected by means similar to those proposed here did not constitute a consolidation into a single system for ownership and operation as contemplated in paragraph (2) of section 5. See *Control of El Paso & Southwestern System,* 90 I. C. C. 732. Counsel for interveners attempt to distinguish many of the Pennsylvania lease cases on the ground that no question of control by purchase of stock was involved. But we were dealing with acquisitions of control by means of 999-year leases where the Pennsylvania already controlled the entire capital stock, except in one instance where 98 per cent was held. The fact that here acquisition of control by purchase of stock and by lease is sought does not change the essential nature of the transaction from one where all the stock is already owned and further control is sought by means of a long-term lease. We therefore conclude that we have jurisdiction under paragraph (2) of section 5 to consider this application.

It was alleged below that the effect of construing Section 5 so as to permit the approval of leases under such circumstances would be to destroy the efficacy of the consolidation plan as visioned by Congress; that the unscrambling of properties might be required by reason of the adoption of a final consolidation plan. The language of paragraph (2) discloses an intention to place discretion with the Commission in this particular. The

power conferred is to authorize acquisitions of control "to the extent indicated by the Commission * * * either under a lease or by the purchase of stock or in any other manner * * *." In short, the acquisition of control may be under the terms of a lease or in any other manner and the extent thereof is left to the discretion of the Commission, subject only to the qualification that it shall not constitute a consolidation "into one corporation," as aforesaid. Prior to the hearings before the Commission it had prepared a tentative consolidation plan in which the Big Four and the Michigan Central lines were assigned to the New York Central system. *Consolidation of Railroads,* 63 I. C. C. 455, 456. Prior to the decision below the Commission had adopted its final plan of consolidation, in which the New York Central, Michigan Central, Big Four, Cincinnati Northern, Terre Haute, as well as the short-line carriers were all assigned to the New York Central system. 159 I. C. C. 522. While these facts are not strictly relevant to the issue of the Commission's authority under Section 5(2), they indicate that, in line with its qualified discretion above mentioned, the Commission considers in cases under that Section the possible effect which the authorization may have in relation to the ultimate consolidation plan, and, further, that appellant's fears as to the possibility of unscrambling the properties were unfounded.

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2. The Commission had valid power to authorize the acquisitions as against the claim of violation of the antitrust laws

Appellant alleged that the Commission lacked power to authorize the acquisitions of control by lease, since the Federal Anti-Trust laws would be violated, and that if Section 5 (8) were construed so as to permit the exercise of such power, it would be invalid as an improper delegation of legislative power to the Commission. (R. 17.) It was also alleged that the lessor and lessee lines were parallel and competing, joint control of which was proscribed under applicable state statutes (R. 20), but this point is apparently relied on in support of the claim of *ultra vires*, elsewhere considered (*infra*, p. 26).

Even assuming that the acquisitions would violate the Anti-Trust laws, which is not conceded, it is clear that the approval by the Commission of the application operates *ipso facto* as a suspension of such laws. Section 5 (8) expressly provides that any carrier affected by any order of the Commission made under the foregoing provisions of the section is relieved from the operation of the antitrust laws. It has been held that even where a carrier has violated the antitrust laws by the acquisition of control of a competing carrier, it might thereafter apply to the Commission for authority under section 5 (2) to reacquire such control, and that the Commission's authorization operates to relieve the operation of the Sherman Law (as well

as other restraints or prohibitions of law, State or Federal). *United States* v. *Southern Pacific Co.* 290 Fed. 443 (D. C. D. Utah, 1923).

Appellant contends, however, that Section 5 (8) is unconstitutional as an attempted delegation of legislative power. Under Section 5 (8), the Commission is not charged with the duty of exempting particular carriers from the provisions of the Anti-Trust laws, but it determines applications for acquisitions of control in accordance with the governing standards, the statute itself providing such exemption. There is then no delegation of the power to exempt except by indirection. Even if the exemption were provided by the Commission's order rather than by the statute, however, the claim would not be well founded. In *Lehigh Valley R. Co.* v. *United States,* 234 Fed 682 (affirmed on another ground, 243 U. S. 412), the court upheld the provisions of Section 12 of the Panama Canal Act (Act of August 24, 1912, c. 392, 37 Stat. 567.) which authorized the Commission to select carrier for specific exemption from the provisions of that Act (which were intended to preserve competition), as against the claim that the section was void as constituting a delegation of legislative power. In *United States* v. *Grimaud,* 220 U. S. 506, the court upheld an act providing for the creation of forest reserves, which act provided criminal penalties for violations of regulations of the Secretary of Agriculture made thereunder. If criminal penalties can be imposed

for the violation of executive regulations, it would appear that the power to exempt from penalties might validly be delegated. The appellant asserts, however, that the standard for exemption from liability, *viz.*, the Commission's finding of public interest, is vague and insufficient. The standards that rates shall not be unreasonable and that discrimination shall not be undue or unjust, under which the Commission performs its "everyday" work, are not definite guides. Standards no more precise have been upheld in *Buttfield* v. *Stranahan,* 192 U. S. 470; *Mutual Film Corporation* v. *Ohio Industrial Commission* 236 U. S. 230; *Mahler v. Eby,* 264 U. S. 32; *Colorado* v. *United States,* 271 U. S. 153, and *American Bond & Mortgage Co. & Trianon, Inc.,* v. *United States,* 52 F. (2d) 318.

3. The claim that the leases proposed would exceed the carriers' charter powers is not a proper subject of inquiry in this suit and is without merit

It is contended that the Commission's orders are invalid because of Section 8809 of the General Code of Ohio, requiring in case of the lease of roads situated in whole or in part within the State that the rental reserved should be at least equal to the carrier's net earnings for the fiscal year preceding the lease. (R. 119.) It is also suggested that State laws prohibit the joint control of parallel and competing lines. (R. 24.) Involved is a consideration of Section 20a (2) as well as Section 5. Pre-

liminary to consideration of the merits of this claim is the question whether there may be injected into a suit under the Urgent Deficiencies Act the issue of corporate capacity of applicant carriers to perform acts permitted by the Commission. In *Pittsburgh & West Virginia Railway Company* v. *United States,* 281 U. S. 479, the court held that a minority stockholder of the Wheeling & Lake Erie could not maintain a suit, under the Urgent Deficiencies Act, to enjoin an order of the Commission authorizing the Wheeling to abandon its passenger station at Cleveland and to use other station facilities. It was contended in that case that the Wheeling had executed contracts without first securing the consent of stockholders as required by Ohio law. The Court dismissed the contention, holding that the question whether the Wheeling could legally exercise the authority granted by the Commission could not be raised in a suit under the Act of October 22, 1913, but only in a suit invoking the plenary equity jurisdiction of the district court. It is doubtful even whether the question here presented could be raised except in a direct proceeding by the State. *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.* v. *United States,* 275 U. S. 404, 414; *Kerfoot* v. *Farmers' & Merchants' Bank,* 218 U. S. 287. The authority exercised by the Commission was permissive in character and it was never intended by the Act that the Commission should be under the duty of determining mat-

ters relating to the corporate powers of applicants before granting or withholding its assent to the proposals outlined in the applications. *Claiborne-Annapolis Ferry Co.* v. *United States et al.*, 285 U. S. 382.

Passing to the merits, it is not clear that the leases are *ultra vires*. The provision of the Ohio law (Sec. 8809, General Code Ohio), relating to the minimum rental was regarded by the lower court as being separable from a provision which conferred the power to lease and was deemed merely a restraint placed upon the exercise of the power. (R. 197.) The State of Ohio has not asserted any claim of *ultra vires* although its representative intervened before the Commission in support of the request of the Federal Valley Railroad that its properties be taken over by the New York Central. (R. 34.) The New York Central and Big Four charter powers are involved by reason of their multiple incorporation. (R. 35.) The effect of incorporation in several states is to create different corporations in each state, with possibly varying powers. *Muller* v. *Dows*, 94 U. S. 444. *Nashua & Lowell Railroad Corporation* v. *Boston & Lowell Railroad Corporation*, 136 U. S. 356. There is no allegation that the rental terms were beyond the carriers' powers as corporations of states other than Ohio.

Assuming, however, that the leases are *ultra vires*, appellant's attack on the order rests upon

the claim: That Section 20a (2) limits the Commission in the entry of orders authorizing the assumption of obligations to instances where the assumption will be within the charter powers of the carrier, by reason of the proviso that the assumption of liability shall be found to be "for some lawful object within [the applicant's] corporate purposes." Appellant reasons that if the leases were beyond the carriers' corporate powers, the Commission was without power to make such a finding. It is clear, by reference to the section and to its legislative history, that Congress did not intend so to limit the Commission's authority. Paragraph (7), Section 20a, provides that the jurisdiction conferred upon the Commission shall be exclusive and that a carrier may issue securities and assume obligations without securing approval other than that of the Commission. That the clause referring to "corporate purposes" does not connote "charter powers" is apparent from the legislative history of the section.[3] Since Section

[3] This provision first appeared in 20a(7) of the Esch-Pomerene Bill, June 2, 1919 (66th Cong., 1st Sess., H. R. 4378, S. No. 1256), and substantially in Section 24 of the Cummins Bill, August 23, 1919 (66th Cong., 1st Sess., S. No. 2906). Later it became Section 437 of the next Esch Bill (66th Cong., 1st Sess., H. R. No. 10453), which was Section 439 of the Cummins Bill. On November 17, 1919, an amendment was offered in the House to strike this paragraph and to provide that no security should be issued under the Act "except in the manner and form prescribed by the laws of the state which created such common carrier, and that this section is not to be construed as a limitation of state author-

20a was intended to relieve carriers from state restrictions, appellant's contention is without merit if Congress had valid power to supersede state control in this field. This Court has held that Congress can validly authorize carriers to perform certain acts beyond their charter powers. In *New York* v. *United States,* 257 U. S. 591, it was held that the Commission had power to authorize a carrier to increase its intrastate rates

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ity, but only as cumulative thereof." This amendment was defeated after debate (Cong. Rec. 66th Cong., 1st Sess., Vol. 58, pt. 9, pp. 8673–8676). In the Esch-Pomerene Bill the phrase "corporate purposes" originally read "corporate powers." Apparently "corporate purposes" was substituted at the suggestion of counsel for the Association of Railway Executives who pointed out that "powers" might be construed to mean state powers. (Hearings before the House Committee on Interstate and Foreign Commerce, 66th Cong., 1st Sess., H. R. 4378, pt. 8, p. 1267.) Senator Cummins' report regarding Section 24 of his bill states:

"But I think there is no real opposition to a provision which confers upon the Interstate Commerce Commission or some other federal agency the supervision of the issuance of railway securities, in that way relieving railway companies of the regulation of 40 of the 48 states of the union. * * * This is intended to concentrate that power in the hands of a federal tribunal." (Cong. Rec. 66th Cong., 2nd Sess., Vol. 59, pt. 1, pp. 137–138.)

Mr. Esch in his report to the House stated:

"Without federal control, the carriers would have to be subjected to the diversified requirements of the several states. * * * The enactment of the pending bill will put the control over stock and bond issues exclusively in the hands of the Federal Government and will result in uniformity and greater promptness of action." (66th Cong., 1st Sess., H. R. No. 457, Nov. 10, 1919.)

beyond the maximum prescribed under its state charter. (*R. R. Comm. Wisconsin* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563.) In *Colorado* v. *United States*, 271 U. S. 153, the Court held that the Commission had power to authorize the abandonment, as respects both intra- and interstate traffic, of a branch line of a railway lying wholly within the State of its incorporation, even though such abandonment was opposed by the State and was assumed to be not authorized by its corporate charter.

4. The Commission's orders can not be attacked upon the ground that the Michigan Central lease was not duly authorized

Appellant alleges that shares of stock in the Michigan Central owned by the New York Central and pledged with the Guaranty Trust Company, under an indenture of April 13, 1898, were illegally voted in favor of the leasing of the road in violation of the terms of the indenture, which required the prior consent of 75% in interest of the bondholders. (R. 19.) Appellant does not claim to be the holder of any of the bonds, its sole interest being as a Michigan Central shareholder. Upon the foregoing discussion, it is submitted that this issue can not be raised in this proceeding. (*Supra*, pp. 24–29.) Moreover, appellant is not a party in interest under the agreement and could not raise the point in any proceeding. *Arkadelphia Milling Co.* v. *St. Louis & S. W. Railway Co. et al.*, 249 U. S. 134, 149, and *Market St. Ry. Co.* v. *Hellman*, 109

Cal. 571, 42 Pac. 225. *Raff* v. *Darrow*, 184 Ind. 353, 111 N. E. 189.

5. The condition in the Commission's order relating to the acquisition of connecting short-line carriers was within its statutory powers, and since the New York Central elected to comply the matter is not one of which appellant stockholder can complain in this proceeding

The Commission in its original report found that the proposed acquisition of control was in the public interest, but it further found that preservation of six connecting short lines [4] was "required by the public convenience and necessity and for the maintenance of an adequate transportation system, as conceived, and provided for by the transportation act," and that, to that end, its authorization of the unification should be upon the express condition that the New York Central shall offer to acquire those short lines at their commercial values,[5] to be

[4] The interveners were: The Chicago, Attica & Southern Railroad Company, the Delaware & Northern Railroad Company; Fonda, Johnstown & Gloversville; The Owasco River Railway; The Southern New York Railway, Inc.; The Ulster & Delaware Railroad Company, and the Casey & Kansas and Kansas & Sidell Railroad Companies.

[5] Prior to the adoption by the Commission of its plan of consolidation, the acquiring by one railroad of the properties of another required no authority from the Commission under Section 5(6) as a consolidation matter. *Snyder* v. *N. Y. C. & St. L. R. Co.*, 160 N. E. 615, 278 U. S. 578. It could be done upon certificate of public convenience and necessity granted under Section 1(18) (U. S. Code, title 49, sec. 1(18)), provided it involved no substantial lessening of competition within the meaning of the Anti-Trust Acts.

determined by agreement or by arbitration in the manner prescribed in the leases for valuation of minority shares of stock of the lessors. Entry of an order authorizing the unification was deferred until the New York Central should have filed proof of bona fide offers to acquire said short line in compliance with the condition. (R. 83, 84.) Subsequently the New York Central made proof, satisfactorily to the Commission, of its compliance with this condition. (R. 99, 21.)

(a) Appellant stockholder can not challenge the judgment of its corporation in this proceeding

As a stockholder of the New York Central, appellant complains of the action of the Commission in declining to approve the leases unless provision was made for the taking over of said connecting short-line carriers. (R. 21, 84.) It is alleged that the New York Central did not need the lines and that their acquisition would impose a financial drain on it. In view of the fact that the Commission's action was permissive and that the New York Central chose to comply with the condition, it would seem clear that appellant is without recourse in this proceeding.

If it be conceded that appellant stockholder has standing to attack the permission given to its corporations to "unify," the difference between the interest which gives it that standing and the interest which supports its alleged grievance in respect of the acquisition by the New York Central of the

connecting short lines is sharply drawn. Appellant was stockholder in two aspects of the railroad companies involved in the main unification; namely, of the lessee companies and the lessor companies. As stockholder of the lessor companies its standing to maintain this suit is not merely derived through its ownership of stock, but is through alleged injury to itself as a member of a class created by the leasing agreements. The payment of rental dividends is to be made directly to the minority stockholders of the lessor companies and the latter are, in effect, third party beneficiaries of the lease agreements authorized by the Commission in all of their terms, and as such they have an independent interest, as well as such other interest as they may have, adverse to majority stockholders controlling the lessor corporations. (R. 189.) But as concerns the condition in the order that the New York Central acquire the connecting short lines, not only is appellant's asserted grievance solely the indirect harm it fears might result through harm to its corporation,[6] but it stands in the position of challeng-

[6] In a footnote in this court's opinion in *Pittsburgh & W. Va. Ry.* v. *U. S.*, 281 U. S. 479, the Commission report in the instant case was cited among other instances of reorganization or finance cases, in respect whereof minority stockholders might have standing to attack the Commission's order of authorization. But the stockholder's interest in the rental dividends or other terms affecting him directly as stockholder is shown by the court's opinion to have a different status than the indirect harm it fears may result from harm to his corporation.

ing the judgment of its corporation which has accepted the condition. In *Pittsburgh & W. Va. Ry. v. United States, supra,* the court held that the appellant's stockholder interest in Wheeling & Lake Erie Railway Company did not give it standing to maintain a suit to set aside an order of the Commission authorizing said railway to abandon certain operations and undertake others. While it is appreciated that the question here is not one of standing, what was there said by the court brings out clearly the character of appellant's asserted grievance in respect of the condition relating to the connecting short lines. At page 486–487 the decision reads:

> * * * Finally, the claim that the order threatens the Wheeling's financial stability, and consequently appellant's financial interest as a minority stockholder, is not sufficient to show a threat of the legal injury necessary to entitle it to bring a suit to set aside the order. This financial interest does not differ from that of every investor in Wheeling securities or from an investor's interest in any business transaction or lawsuit of his corporation. Unlike orders entered in cases of reorganization, and in some cases of acquisition of control of one carrier by another, the order under attack does not deal with the interests of investors. The injury feared is the indirect harm which may result to every stockholder from harm to the corporation. Such stockholder's interest is clearly insuffi-

cient to give the Pittsburgh a standing independently to institute suit to annul this order. The bill should have been dismissed without inquiry into the merits.

Appellant's interest in respect of the condition that the New York Central acquire the short lines is solely by reason of its ownership of stock in that railroad. "The injury feared is the indirect harm which may result to every stockholder from harm to the corporation." Its "financial interest does not differ from that of every investor in Wheeling (New York Central) securities or from an investor's interest in any business transaction or lawsuit of his corporation." The New York Central accepted the condition, and appellant, as minority stockholder, therein can not attack the judgment of its corporation in this proceeding.

(b) Section 5(2) expressly empowers the Commission to attach conditions to its orders authorizing acquisitions of control and the condition in respect of the short lines was plainly within the remedial purpose of the Act

At the hearing on the applications under Section 5(2) nine short-line carriers intervened, asking that their properties be acquired by the New York Central as a condition to the Commission's sanction of the lease. Evidence was submitted by them showing the character and condition of their roads, their relationships with the New York Central, and the benefits which might be expected to flow from their inclusion in the New York Central system.

The New York Central opposed the request of the interveners and submitted evidence as to their financial conditions, etc. The Commission, in its report of January 14, 1929, discusses the facts adduced as to each of the short lines, and found, as to the Delaware and Northern, the Southern New York, and the Casey and Sidell, that there was no basis for their inclusion in the New York Central system. (R. 51–71.) It found that the remaining six lines were complementary to the New York Central system, and that their preservation was required in order to maintain an adequate transportation system. Authorization to enter into the proposed leases was conditioned upon the New York Central's offering to acquire these lines at values fixed by agreement or arbitration, the Commission withholding its order of authorization until compliance with this condition had been shown. (R. 84.) In its supplemental report of July 2, 1929, the Commission stated that the New York Central had substantially complied with the prescribed condition and entered its final order. (R. 94, 100.) Section 5(2) expressly authorizes the Commission to approve applications subject to conditions found by it to be just and reasonable. (Appendix, *infra*, p. 46.) A similar provision is found in Section 20a (2). (*Infra*, p. 48.) It is clear that the language of Section 5(2) affords no support to appellant's

contention that the Commission can not qualify its approval by prescribing conditions not found in the application. *Atlantic Coast Line R. R. Co.* v. *United States,* 284 U. S. 288. Since there is no claim that the condition imposed does not concern the regulation of commerce (*United States* v. *Chicago, etc., R. Co.,* 282 U. S. 311), the only question is whether the condition is just and reasonable and within the scope of the purpose of the Act. The Court has stated that the Transportation Act, 1920, was intended to develop and maintain an adequate general transportation system. *Texas & Pacific Ry. Co.* v. *Gulf, etc., Ry.,* 270 U. S. 266, 277. The protection and development of the weaker lines is one of the principal means by which the Act seeks to achieve that general purpose. Sections tending to effect that object are those relating to the recapture of excess income (Section 15a, *Dayton Goose Creek Ry. Co.* v. *United States,* 263 U. S. 456); to the division of joint rates (Section 15 (6), *Orient Divisions Case,* 265 U. S. 274, 284); and to the fixing of minimum rates so as to prevent cut-throat competition (Section 15 (1), *New England Divisions Case,* 261 U. S. 184, 190, note). It is palpably clear that the condition imposed was within the Commission's power.

II. THE COMMISSION'S ORDERS OF AUTHORIZATION ARE ADEQUATELY SUPPORTED BY EVIDENCE

1. The Commission's finding that the terms of the proposed leases were just is amply supported by the evidence

The remaining questions, *viz.*, whether the rentals provided by the leases were just and whether the acquisitions would be in the public interest, relate to the propriety of the exercise of the Commission's power to authorize the acquisitions of control and the assumption of obligations. Since there is no claim of confiscation, the scope of review is that ordinarily accorded where a full hearing is afforded, namely, where the findings of the Commission are supported by substantial evidence. *Virginian Railway* v. *United States,* 272 U. S. 658, 663; *Colorado* v. *United States,* 271 U. S. 153, 166. Particular attention was given by the Commission and by the lower court to the rental terms, in view of the New York Central's interests in the lessor roads. (R. 76–82, 192–193.) It should be observed that there was no direct allegation in the petition that the Commission's findings were not supported by adequate evidence.

Appellant contends that the rentals provided in the form of annual dividends were disproportionate to the earning powers of the Michigan Central and Big Four and constituted an inadequate return upon the value of the minority stockholders' equities. The leases provided for the payment of rental dividends of $5 to minority holders of Big Four

preferred stock, $10 to Big Four common stock, and $50 to Michigan Central common stock. (R. 46.) In the event that the stockholders chose not to accept the terms, the lessee agreed to purchase their stocks at prices fixed by arbitration. At the hearing date there were outstanding: Big Four common stock having a par value of $47,028,700 ($4,087,600 of which was owned by minority interests[7]) (R. 40); $9,998,500 par value of Big Four preferred stock (of which $1,530,400 was not owned by New York Central interests), and Michigan Central stock having a par value of $18,736,400 ($152,300 of which was owned by the minority). Appellant held 286 shares of Michigan Central stock and 100 shares each of the preferred and common stocks of the Big Four. (R. 10.) The maximum amounts payable as rentals under the leases were $76,520 on the Big Four preferred stock; $408,760 on its common stock; and $76,150 to the holders of Michigan Central stock, exclusive of sums payable to the trustee under the indenture of April 13, 1898. (R. 80.)

The $10 rental dividends provided for Big Four common stock may be contrasted with dividends paid over a five-year period from 1922 to 1926, namely, in 1922, $5; 1923, $4; 1924, $5; 1925, $5.50; 1926, $7; an average of $5.50 per share. (R. 42.)

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[7] $2,360,000 par value of Big Four Common Stock was held by a protective committee and was subsequently sold to the New York Central.

The 5% rental provided for Big Four preferred stock is equivalent to that provided by the provisions relating to that class of stock, and is not here objected to. Prior dividend payments to the holders of the Michigan Central stock, for which the rental provision was $50 per share, were: 1922, $14; 1923, $20; 1924, $20; 1925, $27.50; 1926, $35; 1927, $40 (exclusive of a 50% dividend in that year from accumulated surplus.) (R. 42.)

In considering the adequacy of the payments to be made to the holders of the common stocks of the Michigan Central and the Big Four, the Commission had before it evidence as to the book value of the stockholders' equities (R. 82); statistical studies showing the relation of net earnings to the average market prices of the stocks of certain major carriers over a period of years (for the purpose of determining ratios which would aid in fixing the value of the stocks) (R. 76–77); evidence as to the market values ascribed to guaranteed stocks at various yields and comparisons of dividends paid by strong companies upon stocks guaranteed under lease with dividends paid by operating companies (R. 78); opinion evidence as to the fairness of the rental terms (R. 79); and comparisons between the ratio of past dividend payments to average net income available and the ratio of the rentals provided to such average net earnings. The following table, quoted from the lower court's opinion, summarizes a portion of the evi-

dence upon which the Commission based its finding that the terms were just and reasonable (R. 194; R. 42, 43, 81, 82):

	1 Stockholders' equity per share, Nov. 1, 1927	2 Market value [1] [2]	3 Average net earnings per share [3]	4 Average dividend payments per share	5 Rentals under the leases
Big Four	$201.75	[4] $179.75	$19.86	[5] $5.30	$10.00
Michigan Central	639.78	[4] 827.25	85.78	[7] 23.20	50.00

	6 Ratio of dividend payments to net income available [6]	7 Ratio of rentals to average net earnings	8 Ratio of rentals to stockholders' equity per share	9 Ratio of average dividend payments to value [2]	10 Ratio of rentals to value [2]
	Per cent	*Per cent*	*Per cent*	*Per cent*	*Per cent*
Big Four	25	50	4.9	2.9	5.6
Michigan Central	[7] 24	58	7.8	[7] 2.8	6.0

[1] Including New York Central Lines.

[2] The estimated market value per share was determined by using as a standard comparison the ratio of net earnings to average market value of the stocks of certain major carriers of the country over a period of years. With this was also compared the ratio of guaranteed dividends to market value of railroad stocks, affording some indication that the guaranteed rental might result in an appreciation in market value of Big Four stock held by the minority.

[3] Average for 1922–1927.

[4] Average for 1924–1927, computed on basis of ratio of earnings to market value of major carriers, 1915–1925.

[5] Average for 1922–1926.

[6] Found by Commission for 1921–1926.

[7] Exclusive of extra dividend of 50 per cent of accumulated surplus in 1927.

It appears from the table that the rental dividends provided were approximately twice the average dividend payments for the years 1922–1927; that they constituted approximately 50% of the amount of average net earnings available for the payment of dividends in such years, and a return of 4.9% and 7.8%, respectively, on the stockhold-

ers' equity per share in the Big Four and Michigan Central.

It is urged, however, that the dividend rentals are manifestly inadequate in view of the large earned and undistributed corporate surpluses of the Big Four and Michigan Central, as of November 30, 1927. (R. 82.) The Commission, however, considered the existence of such surpluses in arriving at the conclusion that rentals as high as those provided for by the leases would be in the public interest. (R. 82.) One of the Commissioners thought the rentals excessive. (R. 86.) It must be considered that the maintenance of a surplus, such as those here existing, is necessary in order to insure the continuity of dividend payments and to provide for unforeseen risks, and that the guaranty by the New York Central of fixed dividends substantially eliminates the element of risk as to future dividend payments. In determining whether the rentals were reasonable, the Commission was obliged to consider not only stockholders' rights but the public interest in rates and continued service. The fairness of the rentals must also be considered in the light of the period for which the lease was to run. The lessee in committing itself to payment over a 99-year period is exposed to the risks of fluctuating income and possibly changing traffic conditions. The former risk is well evidenced by present economic conditions, the effect of which in relation to the transportation business

were judicially noticed by the Court in *Atchison, Topeka & Santa Fe Ry.* v. *United States*, 284 U. S. 248.

Appellant asserts, however, that in view of the New York Central's control of the lessor roads, the test of the adequacy of the rentals should be whether the maximum rental dividend available from any source was provided for in the lease. Testimony of officials, acting in the matter, who stated that they had made no attempt to obtain outside bids on the lease, is relied upon. (R. 218–222.) Even assuming that the claim of breach of fiduciary duty can be raised in this proceeding (*Pittsburgh & West Virginia Ry. Co.* v. *United States,* 281 U. S. 479, 488), it would seem that the Commission's finding that the considerations, terms, and conditions were just and reasonable, when supported by the foregoing evidence, would be conclusive. The Commission has shown careful regard for minority rights in acquisitions where carriers have acted in a dual capacity. *Nickel Plate Unification,* 105 I. C. C. 425. The securing of outside bids was not necessary to establish good faith when it is apparent that by reason of its stock ownership the New York Central would not consent to the leasing of these lines to outside interests. Nothing in *Cleveland, C. C. & St. Louis Ry.* v. *United States,* 22 F. (2d) 509 (C. C. A. 6th), supports appellant's contention in this respect. In that case a stockholder of the Big Four sought to enjoin the New York

Central from voting stock which it held in the Big Four in favor of the execution of the present lease. The court reversed a decree below, granting an injunction, upon the ground that the lease had not yet been approved by the Commission, and stated that the Commission, before approval, was required to find that the considerations, terms, and conditions were just both to the lessor and to the lessee, and to the stockholders of each.

It is submitted that the Commission's finding was amply supported by evidence. The fairness of the leases is demonstrated by the alternate provision providing for the purchase by the lessee, at prices fixed by arbitration, of the shares of the minority interests.

2. The Commission's finding of public interest is sufficiently supported by the evidence

The advantages expected to result from the acquisitions have been above outlined. (*Supra,* p. 5.) The question whether the consummation of the leases would be in the public interest is essentially an administrative one. In addition to the close interrelation of the roads, which seemed to justify further unification, definite benefits were expected to accrue from the acquisitions. Revision of routes could be made due to the elimination of any objection to short hauling the lessor lines and alternate routes could be established. (R. 48.) Traffic could be routed over the most economical

routes through interchangeable rates (the unit obtaining the traffic to be credited irrespective of the route used), although no routes desired by shippers were to be closed. New routes were to be developed, expected to result in an aggregate saving of 11,796,789 car-miles through direct routing, eliminating approximately $1,000,000 in annual transportation expense. (R. 49.) Unified operation would also reduce yard movements and terminal switching and permit the routing of freight away from congested terminals. Transportation benefits were summarized as savings in car-miles affecting time in transit and deliveries; a better car supply, through expeditious movement of traffic; and substantial economies in operating costs through more effectual train grouping, reduced yard operations, and elimination of duplicated effort at common terminal points. Economies would be effected by the adoption of a unified accounting system in place of the detailed accounting now required for each company. (R. 50.) Major advantages would result in relation to the repair of equipment. Repair-shop extensions contemplated by the New York Central and Michigan Central, estimated to cost $7,000,000, could be indefinitely deferred through use of Big Four facilities (R. 50), and minor economies could be effected through the closing or combination of smaller shops.

It is submitted that, upon this showing, the lower court properly held that the Commission's finding of public benefit was sufficiently supported by the evidence.

CONCLUSION

It is respectfully submitted that the decree below should be affirmed.

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OCTOBER, 1932.

I

APPENDIX

The Interstate Commerce Act, as amended, provides, in part:

> SEC. 5. (2) Whenever the Commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this Act, that the acquisition, to the extent indicated by the Commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the Commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises. (c. 91, 41 Stat. 481, U. S. C., Title 49, Sec. 5 (2).)
>
> (4) The Commission shall as soon as practicable prepare and adopt a plan for the consolidation of the railway properties of the continental United States into a limited number of systems. In the division of such railways into such systems under such plan, competition shall be preserved as fully as possible and wherever practicable the existing routes and channels of trade and com-

merce shall be maintained. Subject to the foregoing requirements, the several systems shall be so arranged that the cost of transportation as between competitive systems and as related to the values of the properties through which the service is rendered shall be the same, so far as practicable, so that these systems can employ uniform rates in the movement of competitive traffic and under efficient management earn substantially the same rate of return upon the value of their respective railway properties. (c. 91, 41 Stat. 481, U. S. C., Title 49, Sec. 5 (4).)

(5) When the Commission has agreed upon a tentative plan, it shall give the same due publicity and upon reasonable notice, including notice to the Governor of each State, shall hear all persons who may file or present objections thereto. The Commission is authorized to prescribe a procedure for such hearings and to fix a time for bringing them to a close. After the hearings are at an end, the Commission shall adopt a plan for such consolidation and publish the same; but it may at any time thereafter, upon its own motion or upon application, reopen the subject for such changes or modifications as in its judgment will promote the public interest. The consolidations herein provided for shall be in harmony with such plan. (c. 91, 41 Stat. 481, U. S. C., Title 49, Sec. 5 (5).)

(6) It shall be lawful for two or more carriers by railroad, subject to this Act, to consolidate their properties or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership, management, and operation * * *. (c. 91, 41 Stat. 481, U. S. C. Title 49, Sec. 5(6).)

(8) The carriers affected by any order made under the foregoing provisions of this section and any corporation organized to effect a consolidation approved and authorized in such order shall be, and they are hereby, relieved from the operation of the "antitrust laws," as designated in section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, and of all other restraints or prohibitions by law, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section. (c. 91, 41 Stat. 482, U. S. C. Title 49, Sec. 5(8).)

SEC. 20a. (1) That as used in this section the term "carrier" means a common carrier by railroad (except a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation) which is subject to this Act, or any corporation organized for the purpose of engaging in transportation by railroad subject to this Act. (c. 91, 41 Stat. 494, U. S. C. Title 49, Sec. 20a (1).)

(2) From and after one hundred and twenty days after this section takes effect it shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed "securities") or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to

the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the Commission by order authorizes such issue or assumption. The Commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose. (c. 91, 41 Stat. 494, U. S. C. Title 49, Sec. 20a (2).)

(3) The Commission shall have power by its order to grant or deny the application as made, or to grant it in part and deny it in part, or to grant it with such modifications and upon such terms and conditions as the Commission may deem necessary or appropriate in the premises, and may from time to time, for good cause shown, make such supplemental orders in the premises as it may deem necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any securities so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of the foregoing paragraph (2). (c. 91, 41 Stat. 495, U. S. C. Title 49, Sec. 20a(3).)

(4) Every application for authority shall be made in such form and contain such mat-

ters as the Commission may prescribe. Every such application, as also every certificate of notification hereinafter provided for, shall be made under oath, signed and filed on behalf of the carrier by its president, a vice president, auditor, comptroller, or other executive officer having knowledge of the matters therein set forth and duly designated for that purpose by the carrier. (c. 91, 41 Stat. 495, U. S. C. Title 49, Sec. 20a (4).)

(6) Upon receipt of any such application for authority the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which the applicant carrier operates. The railroad commissions, public service or utilities commissions, or other appropriate State authorities of the State shall have the right to make before the Commission such representations as they may deem just and proper for preserving and conserving the rights and interests of their people and the States, respectively, involved in such proceeding. The Commission may hold hearings, if it sees fit, to enable it to determine its decision upon the application for authority. (c. 91, 41 Stat. 495, U. S. C. Title 49, Sec. 20a(6).)

(7) The jurisdiction conferred upon the Commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein. (c. 91, 41 Stat. 495, U. S. C. Title 49, Sec. 20a(7).)

(8) Nothing herein shall be construed to imply any guaranty or obligation as to such securities on the part of the United States.

(c. 91, 41 Stat. 495, U. S. C. Title 49, Sec. 20a(8).)

(11) Any security issued or any obligation or liability assumed by a carrier, for which under the provisions of this section the authorization of the Commission is required, shall be void, if issued or assumed without such authorization therefor having first been obtained, or if issued or assumed contrary to any term or condition of such order of authorization as modified by any order supplemental thereto entered prior to such issuance or assumption; but no security issued or obligation or liability assumed in accordance with all the terms and conditions of such an order of authorization therefor as modified by any order supplemental thereto entered prior to such issuance or assumption, shall be rendered void because of failure to comply with any provision of this section relating to procedure and other matters preceding the entry of such order of authorization. * * * (c. 91, 41 Stat. 496, U. S. C. Title 49, Sec. 20a(11).)

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